

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Yesterday, following a joint press conference addressed by Union Ministers Ravi Shankar Prasad (Minister for Electronics and Information and Technology) and Prakash Javdekar (Minister of Information and Broadcasting), the Government of India notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**Intermediary and Digital Media Guidelines**”) under the Information Technology Act, 2000 (“**IT Act**”) in supersession of the Information Technology (Intermediary Guidelines) Rules, 2011 (“**2011 Guidelines**”). Changes to the rules have been in the offing for some time, and our article on draft version can be accessed [here](#).

The Intermediary and Digital Media Guidelines, to be administered jointly by the Ministry of Electronics and Information Technology (“**MEITY**”) (administering intermediary regulation under Part II) and the Ministry of Information and Broadcasting (“**MIB**”) (administering digital media under Part III), constitute far-reaching changes to the legal framework governing intermediaries (originally defined under the IT Act to mean persons who, on behalf of another person receive, store, transmit, or provide any service with respect to, electronic records, such as telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes).

The new legal regime extends to publishers of news and current affairs content (which will include online papers, news portals, news aggregators and agencies, but exclude physical newspapers, their online equivalent and individuals or users who do not transmit content in course of systematic business or professional or commercial activity) (“**News Publishers**”) and publishers of online curated content (which will include entities which perform a significant role in determining the content and provide



users with curated content over the internet, but exclude entities or users who are not transmitting such curated content in the course of systemic business, professional or commercial activity) (“**Content Publishers**”).

Some of the key features of the Intermediary and Digital Media Guidelines are set out below.

Additional Intermediary Obligations:

The existing notice and takedown-centric “due diligence” regime under the 2011 Guidelines has been modified with several material additions. These include obligation to:

- (a) Put in place user terms restricting content which is patently false, misleading, inconsistent with or contrary to the laws of India;
- (b) Remove hosted information which is *prima facie* in the nature of explicit material meeting certain criteria within 24 (twenty-four) hours of receiving a complaint;

- (c) Remove hosted information which is notified as being in violation of law promptly and no later than 36 (thirty-six) hours after receiving such notice;
- (d) Provide hosted information or assistance which is requested by a lawfully authorized agency promptly and no later than 72 (seventy-two) hours after receiving a written notice indicating the purpose of such request;
- (e) Put in place a grievance mechanism redressal mechanism, headed by a grievance officer to receive and acknowledge in 24 (twenty-four) hours and resolve within 15 (fifteen) days user complaints and address government orders;
- (f) Preserve data on user registration information and takedowns for 180 (one hundred and eighty) days or a longer period as may be prescribed; and
- (g) Publish a clear statement on its website and mobile application informing News Publishers that in addition to the common terms of use, News Publishers are required to furnish details of user accounts to the MIB as required under the Intermediary and Digital Media Guidelines.

A transient storage exception on takedown obligations under Rule 3(1)(e) has been narrowed to exclude automated or algorithmic 'editorial' control. The impact on the usage of sorting algorithms for automated storage will need to be examined here.

Intermediaries violating the above will risk impugning their safe harbour protection. Correspondingly, actions done in furtherance of the above will not impair their intermediary status, thanks to an expanded savings clause (Rule 3(1)(d) Proviso 3).

Social Media Intermediaries and Significant Social Media Intermediaries:

The Intermediary and Digital Media Guidelines seek to classify intermediaries that primarily provide means for online interaction between their users as social media intermediaries ("SMI").

Where an SMI's user base exceeds five million users, it will be regarded as a significant SMI ("SSM"), and will be subject to additional regulation. Users include all persons



who access or use, individually or jointly, resources of an intermediary. As such, ascertaining the number of unique users who use the resources of an SSM may prove to be difficult. Other intermediaries may also be notified as SSM based on specified considerations.

SSMs are subject to the following additional material obligations.

- (a) **Local Presence:** SSMs are required to maintain a physical contact address in India to receive communications. They are also required to appoint employees who are residents of India, as:
 - (i) A Chief Compliance Officer (a key managerial person or other senior employee) responsible (and liable) for ensuring compliance with the IT Act and Intermediary and Digital Media Guidelines;
 - (ii) A Nodal Officer for round the clock coordination with law enforcement agencies; and
 - (iii) A Grievance Officer to address user complaints.

The Nodal Officer and Chief Compliance Officer cannot be the same person.

- (b) **Tracing:** SSMs providing services primarily in the nature of messaging are required to enable tracing of the "first originator" of information on their computer resources upon receiving a direction to do so. Where such first originator is based outside

India, SSMs are required to provide details of the first originator in India. While the circumstances for such direction of disclosure have been defined narrowly, the retrospective application of this requirement may make this requirement difficult to implement.

- (c) **Technological and Automated Measures:** SSMs are required to deploy technological measures to proactively monitor, identify and remove certain types of information including copies of information removed pursuant to a prior order. Measures taken under this provision are required to be proportionate and have regard to the freedom of speech and privacy of the user. Further, SSMs are required to employ mechanisms for human oversight over automated tools to ensure accuracy and fairness.
- (d) **Account Verification:** SSMs are required to provide Indian users with a means to voluntarily verify their accounts including through an active Indian mobile number. Verified users are required to be depicted with a notation visible to all users of the Intermediary.
- (e) **Advertising:** Content that has been promoted or targeted for financial benefit by an SSM, or is exclusively controlled by it, is required to be identified as such.
- (f) **Governance:** SSMs which disable access to data are required to offer their originators with details of such action, and an opportunity to dispute it, subject to applicable law. Originators are to be given the opportunity to reinstate contents as well.
- (g) **Transparency Reports:** SSM's are required to publish monthly compliance reports with details of complaints received from users, actions taken and information disabled or removed by the intermediary through proactive monitoring using automated tools.

News Publishers And Content Publishers

The Intermediary and Digital Media Guidelines create a *de novo* regulatory regime for News Publishers and Content Publishers (collectively “**Publishers**”) who are not typically intermediaries, and raise some interesting legal questions by doing so through delegated legislation under the IT Act.

They provide clarity around the definition of what constitutes ‘News or Current Affairs’ or news aggregators, for the purposes of digital media.

(a) Rule 2(m) defines ‘News and Current Affairs’ inclusively to mean:

“newly received or noteworthy content, including analysis, especially about recent events primarily of socio-political, economic or cultural nature, made available over the internet or computer networks and, any digital media shall be news and current affairs content where the context, substance, purpose, import and meaning of such media is in the nature of news and current affairs content.”

(b) Rule 2(o) defines a ‘news aggregator’ to mean

“an entity who, performing a significant role in determining the news and current affairs content being made available, makes available to users a computer resource that enable such users to access the news and current affairs content which is aggregated, curated and presented by such entity.”

This guidance may prove useful in interpreting long standing ambiguity around obligations under Press Note 4 of 2019 (“**PN4**”), which regulates foreign direct investment into “*Uploading/ Streaming of News & Current Affairs through Digital Media*”. The guidelines also recognize a nuanced analysis of the classification of “news” and “non-news” content within the same platform.

- (c) Obligations are imposed on Publishers who operate (including by having any physical presence) in India or generate content (available in India) targeting Indian users in a systematic manner. Such obligations include providing specified information to the MIB and publishing details of grievances received and action taken.
- (d) The obligations of intermediaries are limited to the requirement of registration of News Publishers with the MIB, and the inclusion of a visible verification mark upon registration. Further, intermediaries are required to comply with blocking or removal directions issued by the MIB.

- (e) Publishers are also required to comply with a Code of Ethics:
- (i) For News Publishers, by complying with the Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978, the Programme Code under section 5 of the Cable Television Networks regulation) Act, 1995 and other prohibitions provided under any other laws.
 - (ii) For Content Publishers, by ensuring that they do not transmit illegal content, avoiding certain proscribed categories of content, and complying with detailed guidance around classification of content into specific categories.
- (f) Content Publishers are also required to put in place age verification mechanisms to restrict access to adult or age restricted content.

Grievance Redressal Mechanism For Digital Media Entities

The Intermediary and Digital Media Guidelines propose a three-tier regulatory structure for Publishers for redressal of grievances. Complaints directed to the relevant entity are required to be acknowledged within 24 (twenty-four)

hours and addressed and responded to within 15 (fifteen) days. A resident grievance redressal officer is responsible for obligations under this requirement.

The following three-tiered structure has been proposed under the Intermediary and Digital Media Guidelines for Publishers:

- (i) The first tier will entail the Publishers to implement an internal grievance redressal mechanism for resolving grievances of users in a time-bound manner;
- (ii) The second tier consists of one or more self-regulatory bodies established by Publishers, consisting of and headed by independent eminent persons with specified qualifications, to be approved by, and registered with the MIB. This body is required to oversee and ensure alignment to the Code of Ethics apart from functioning as an appellate body for grievance redressal; and
- (iii) The third tier is an oversight mechanism administered by the MIB. Apart from publishing a charter for self-regulatory bodies, the mechanism includes a designated 'Authorized Officer' chairing an Inter-Departmental Committee, which is, *inter alia*, an appellate body, and is empowered to make recommendations for blocking content through the Secretary, MIB.





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